

**REDACTED DECISION – DOCKET NUMBER 11-245 C – BY – A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION ON APRIL 4, 2012 – ISSUED ON SEPTEMBER 13, 2012**

**SYNOPSIS**

**TAXATION -- SUPERVISION --** It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. See W. Va. Code Ann. § 11-1-2 (West 2010).

**TAXATION -- PROCEDURE AND ADMINISTRATION --** “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010).

**TAXATION -- CONSUMERS SALES AND SERVICE TAX --** “For the privilege of selling tangible personal property . . . and for the privilege of furnishing certain selected services . . . the vendor shall collect from the purchaser the tax as provided under this article, . . . and shall pay the amount of tax to the tax commissioner in accordance with the provisions of this article . . .” W. Va. Code Ann. § 11-15-3(a) (West 2010).

**TAXATION -- CONSUMERS SALES AND SERVICE TAX --** “The purchaser shall pay to the vendor the amount of tax levied by this article which is added to and constitutes a part of the sales price, and is collectible by the vendor who shall account to the state for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4(a) (West 2010).

**TAXATION -- CONSUMERS SALES AND SERVICE TAX --** “Each vendor shall collect from the purchaser, the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code R. § 110-15-4.1 (1993).

**TAXATION -- CONSUMERS SALES AND SERVICE TAX --** A vendor is defined as “any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property.” W. Va. Code Ann. § 11-15-2(b)(26) (West 2010).

**TAXATION -- CONSUMERS SALES AND SERVICE TAX --** “If any vendor fails to collect the tax imposed by section three of this article, the vendor shall be personally liable for the amount the vendor failed to collect . . . .” W. Va. Code Ann. § 11-15-4a (West 2010).

**TAXATION -- CONSUMERS SALES AND SERVICE TAX --** Officers of an association or corporation “shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest

thereon imposed . . . may be enforced against them as against the association or corporation which they represent.” W. Va. Code Ann. § 11-15-17 (West 2010).

**TAXATION -- CONSUMERS SALES AND SERVICE TAX --** “The officers of a corporation or association that are personally liable for consumer [sic] sales tax include any president, vice-president, secretary, or treasurer, and any other officers provided in the charter or by-laws of the corporation or association, and any person who is elected or appointed to any position with the authority of an officer, and who performs duties or responsibilities in the management of the corporation. The officers of an association include all members of its governing board and trustees. A person such as an incorporator, shareholder, member or employee of a corporation or association is not considered to be an officer subject to personal liability.” W. Va. Code R. § 110-15-4a.5 (1993).

**TAXATION -- CONSUMERS SALES AND SERVICE TAX --** “A person who is elected or appointed as an officer without his knowledge or consent, or who does not act as an officer and does not assume the character, duties, or responsibilities of an officer, is not liable as an officer.” W. Va. Code R. § 110-15-4a.5.1 (1993).

**WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF --** In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment the burden of proof is upon the petitioner to show that any assessment of tax or penalty is erroneous, unlawful, void or otherwise invalid. See W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code R. § 121-1-63.1 (2003).

**WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF MET --** At the time Company A defaulted on its tax obligations to the State of West Virginia, Petitioner was not an officer in the corporation, nor was he assuming the character, duties, or responsibilities of an officer. As a result, the Petitioner has met his burden of showing that the officer liability assessments issued against him were erroneous.

### **FINAL DECISION**

On April 11, 2011, the Respondent issued two officer liability assessments against the Petitioner, personally, as a responsible officer of Company A. One assessment was for the period ending June 30, 2008, for sales tax in the amount of \$\_\_\_\_\_, interest of \$\_\_\_\_\_ and additions of \$\_\_\_\_\_, for a total liability of \$\_\_\_\_\_. The second assessment was for combined sales and use tax and involves tax in the amount of \$\_\_\_\_\_, interest of \$\_\_\_\_\_ and additions of \$\_\_\_\_\_ for a total liability of \$\_\_\_\_\_. According to the petition for reassessment, written notice of these assessments was served on the Petitioner on June 11, 2011.

Thereafter, on July 13, 2011, the Petitioner timely filed with this Tribunal, a petition for reassessment. An evidentiary hearing was held in this matter on April 4, 2012, at the conclusion of which the matter became ripe for a decision.

### **FINDINGS OF FACT**

1. In July of 1999, the Petitioner formed a corporation, Company A. The purpose of the corporation was to operate a Company B franchise in Cabell County, West Virginia.

2. Company A retained the services of an accountant, Mr. A, to assist it with payroll and return preparation.

3. Pursuant to his duties for Company A, Mr. A began using a signature stamp with the Petitioner's name. Mr. A used this stamp on tax returns and payroll checks, among other documents.

4. Within seven months of the formation of the corporation, the Petitioner decided that he no longer wished to be involved in the day to day operations of Company A, nor did he wish to be an officer. Due to the fact that the Petitioner's brother, Mr. B had been helping with the business, the decision was made to let him take over completely.

5. This turn of events was conveyed to Mr. A by a letter from Mr. B, dated February 1, 2000. This letter indicated that the Petitioner would, for a period of ten months, be available for consultation regarding the operation of the business and that he would be paid the sum of \$50.00 a week for the same.

6. After February 2000, the Petitioner had absolutely no involvement in the corporation, either on a day to day operational level or from behind the scenes on a strategic level.

7. After February 2000, Mr. A had no further contact with the Petitioner regarding Company A and all of his subsequent dealings were with Mr. B.

8. Despite the February 1, 2000 letter, and despite having no further dealings with the Petitioner, Mr. A continued to use the stamp bearing the signature of the Petitioner, on various documents including tax filings with the state Tax Department.

9. At some uncertain date, there were unpaid taxes and a default on the part of Company A.

### **DISCUSSION**

West Virginia Code Section 11-15-3(a) holds that, “For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the commissioner in accordance with the provisions of this article.”<sup>1</sup> Further, West Virginia Code Section 11-15-4 states that, “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. §§ 11-15-3 (a) and 11-15-4 (West 2010).

According to West Virginia Code of State Rules Section 110-15-4.1, “Each vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before, or at the time, such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code R. § 110-15-4.1 (1993). Additionally, pursuant to West Virginia Code Section 11-15-4(a), “If any

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<sup>1</sup> Vendor means “any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property.” W. Va. Code Ann. § 11-15-2(z) (West 2010). The amount of consumers sales and service tax is “six cents on the dollar of sales or services, excluding gasoline and special fuels, which remain taxable at the rate of five cents on the dollar of sales.” W. Va. Code Ann. § 11-15-3(b) (West 2010).

vendor fails to collect the tax imposed by section three of this article, he shall be personally liable for such amount as he failed to collect.” W. Va. Code Ann. § 11-15-4(a) (West 2010).

The West Virginia consumers sales and service tax statute provides that officers of an association or corporation “shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed . . . may be enforced against them as against the association or corporation which they represent.” W. Va. Code Ann. § 11-15-17 (West 2010).

The Tax Commissioner has promulgated regulations which flesh out the statutory mandate as to the liability of corporate officers:

4a.1. If the taxpayer is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the consumers sales and service tax and any additions to tax, penalties and interest thereon imposed by W. Va. Code § 11-10-1 et seq. may be enforced against them as against the association or corporation which they represent.

4a.5. The officers of a corporation or association that are personally liable for consumers sales tax include any president, vice-president, secretary, or treasurer, and any other officers provided in the charter or by-laws of the corporation or association, and any person who is elected or appointed to any position with the authority of an officer, and who performs duties or responsibilities in the management of the corporation. The officers of an association include all members of its governing board and its trustees. A person such as an incorporator, shareholder, member or employee of a corporation or association is not considered to be an officer subject to personal liability.

4a.5.1. A person who acts as an officer or assumes the character, duties or responsibilities of an officer, is presumed to be an officer, and such person cannot avoid personal liability by alleging he was not properly elected. *A person who is elected or appointed as an officer without his knowledge or consent, or who does not act as an officer and does not assume the character, duties, or responsibilities of an officer, is not liable as an officer.*

W. Va. Code R. § 110-15-4a (1993) (Emphasis added.).

All of the testimony in this matter was un-rebutted. Therefore it is clear that at the time Company A defaulted on its West Virginia tax obligations, Petitioner was not an officer. Nor was he assuming the character and duties of an officer. It is equally clear that however ill-advised Mr. A's continued use of the Petitioner's signature stamp may have been, it did not confer officer liability on Petitioner. Nor has the Tax Commissioner argued that Mr. A's continued use of the stamp, in and of itself, would confer officer liability upon the Petitioner. As a result, the Petitioner has met his burden of showing that the assessments issued against him, as an officer of Company A., were incorrect.

### **CONCLUSIONS OF LAW**

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. "The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable." W. Va. Code Ann. § 11-10-11(a) (West 2010).

3. "For the privilege of selling tangible personal property . . . and for the privilege of furnishing certain selected services . . . the vendor shall collect from the purchaser the tax as provided under this article, . . . and shall pay the amount of tax to the tax commissioner in accordance with the provisions of this article . . ." W. Va. Code Ann. § 11-15-3(a) (West 2010).

4. "The purchaser shall pay to the vendor the amount of tax levied by this article which is added to and constitutes a part of the sales price, and is collectible by the vendor who shall account to the state for all tax paid by the purchaser." W. Va. Code Ann. § 11-15-4(a) (West 2010).

5. “Each vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price” W. Va. Code R. § 110-15-4.1 (1993).

6. A vendor is defined as “any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property.” W. Va. Code Ann. § 11-15-2(b)(26) (West 2010).

7. “If any vendor fails to collect the tax imposed by section three of this article, the vendor shall be personally liable for the amount the vendor failed to collect . . . .” W. Va. Code Ann. § 11-15-4a (West 2010).

8. Officers of an association or corporation “shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed . . . may be enforced against them as against the association or corporation which they represent.” W. Va. Code Ann. § 11-15-17 (West 2010).

9. “The officers of a corporation or association that are personally liable for consumer [sic] sales tax include any president, vice-president, secretary, or treasurer, and any other officers provided in the charter or by-laws of the corporation or association, and any person who is elected or appointed to any position with the authority of an officer, and who performs duties or responsibilities in the management of the corporation. The officers of an association include all members of its governing board and trustees. A person such as an incorporator, shareholder, member or employee of a corporation or association is not considered to be an officer subject to personal liability.” W. Va. Code R. § 110-15-4a.5 (1993).

10. “A person who is elected or appointed as an officer without his knowledge or consent, or who does not act as an officer and does not assume the character, duties, or responsibilities of an officer, is not liable as an officer.” W. Va. Code R. § 110-15-4a.5.1 (1993).

11. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment the burden of proof is upon the petitioner to show that any assessment of tax or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code R. § 121-1-63.1 (2003).

12. At the time Company A defaulted on its tax obligations to the State of West Virginia, Petitioner was not an officer in the corporation nor was he assuming the character, duties, or responsibilities of an officer. As a result, the Petitioner has met his burden of showing that the officer liability assessments issued against him were erroneous.

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the officer liability assessments, issued against the Petitioner on April 11, 2011, for a total amount due of \$\_\_\_\_\_, are hereby **VACATED**.

**WEST VIRGINIA OFFICE OF TAX APPEALS**

By: \_\_\_\_\_  
A. M. “Fenway” Pollack  
Chief Administrative Law Judge

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Date Entered